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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	
ALFRED A. KAPLAN, d/b/a Al Kaplan Realty, RESPONDENT.	:	FINAL DECISION AND ORDER

The State of Wisconsin, Real Estate Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Board.

The rights of a party aggrieved by this Decision to petition the Board for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 21ST day of FEBRUARY, 1991.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	
	:	PROPOSED DECISION
ALFRED A. KAPLAN, d/b/a AL KAPLAN REALTY, RESPONDENT.	:	LS 8910091 REB

The parties to this proceeding for the purposes of s. 227.53, Stats., are:

Alfred A. Kaplan
2023 East Howard Avenue
Milwaukee, WI 53207

Wisconsin Real Estate Board
P.O. Box 8935
Madison, WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

On November 5, 1990, a hearing was held in the above captioned matter at 1400 East Washington Avenue, Madison, Wisconsin. Respondent Alfred Kaplan appeared in person, together with his attorney, William Ryan, 631 North Mayfair Road, Wauwatosa, WI 53226. Complainant Division of Enforcement appeared by counsel, Henry E. Sanders. At the hearing, the parties presented a stipulation of facts, and, by agreement between the parties, Attorney Ryan argued the issue of what discipline, if any, is appropriate in this matter. Mr. Sanders, attorney for the complainant, moved to dismiss all allegations of the complaint except for Paragraph 1, the first sentence of Paragraph 2, all of Paragraph 3, all of Paragraph 7, and the allegation of Paragraph 15 c. The motion was granted, and the complaint is amended accordingly. On the basis of the stipulation of facts, the arguments, and the entire record and file in this matter, the Administrative Law Judge recommends that the Real Estate Board adopt the following Findings of Fact, Conclusions of Law, Order and Opinion as its Final Decision in this matter.

FINDINGS OF FACT

1. Respondent Alfred Kaplan is and at all times material to this proceeding was licensed as a real estate broker under a license issued in February, 1981.

2. On or about January 1, 1985, respondent entered into an exclusive residential listing contract with Marion M. Geronime to sell her land contract vendee's interest in a duplex located at 8607 and 8609 West Appleton Avenue, Milwaukee, Wisconsin.

3. On November 19, 1985, respondent drafted an offer to purchase in which Richard Belling offered to purchase the duplex at the price of $69,000. The offer contained the following terms:

a. $7,000 earnest money in the form of a check to be paid within three days of acceptance, time of the essence.

b. The offer was contingent upon securing a first mortgage in the amount of $62,000 for a 30 year term at current rates, from Great American Savings and Loan Association.

c. Acceptance to occur on or before November 22, 1985, and closing on December 20, 1985.

d. Possession delivered to buyer on date of closing.

e. Subject to an owner's policy of title insurance.

4. Respondent Kaplan, seller Geronime, and purchaser Belling had a long-standing business relationship. Respondent Kaplan had been involved in at least seventeen transactions with Geronime, and had been involved in at least three transactions with Belling.

5. After Geronime accepted Belling's offer to purchase the duplex, Geronime, the seller, agreed with Belling, the purchaser, that the $7,000 earnest money provision could be satisfied in part by work credits given to the buyer for work on the subject property.

6. Respondent Kaplan informed the prospective lender for the transaction of the arrangement concerning the work credits in lieu of full payment of the $7,000 earnest money. The lender, prior to closing of the transaction, approved of the arrangement.

7. Belling did substantial work on the property both before and after the closing in furtherance of the work credit agreement between himself and Geronime.

8. At the closing, the lender inquired for the first time as to the extent of the work credits, and, at the closing, stated that its private mortgage insurer would not insure the loan if the earnest money was paid in the form of work credits. At the closing, the lender stated to all parties that there must be a verification of earnest money deposit, and lender then and there prepared a verification of earnest money deposit for respondent Kaplan's signature.

9. Respondent Kaplan signed the false Verification of Deposit, dated November 27, 1985, stating that he had $7,000 in his trust account in connection with the purchase of the subject property, as earnest money paid by Belling.

10. The date on the Verification of Deposit was inserted by the financial institution which prepared it on the date of the closing, some time subsequent to November 27, 1985.

11. Belling, the buyer, continues to live in the duplex which was the subject of this transaction, and is current on his mortgage payments. There has been no foreclosure action, and Belling has not been harmed by the work credit in lieu of earnest money arrangement.

12. Respondent Kaplan has been a licensed real estate broker since 1981, and, other than this proceeding, there have been no complaints brought against him by the Wisconsin Real Estate Board. This proceeding was originally scheduled for a hearing in January, 1990, and the parties have attempted at length to resolve the matter.

CONCLUSIONS OF LAW

1. The Real Estate Board has jurisdiction in this matter pursuant to s. 452.14(3), Stats.

2. By submitting a false verification of earnest money deposit to the lender in the transaction between Geronime and Belling, respondent misrepresented material facts in a real estate transaction in violation of s. RL 24.07(1), Wis. Admin. Code, and s. 452.14(3)(k), Stats., and has thereby demonstrated incompetency to act as a real estate broker in a manner to safeguard the public, under s. RL 24.01, Wis. Admin. Code and s. 452.13(3)(i), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the real estate broker's license previously issued to respondent Alfred A. Kaplan be, and hereby is, SUSPENDED for a period of one month, commencing ten days after the date of this order.

OPINION

Respondent Alfred Kaplan knowingly provided a false document relating to the financing of a real estate transaction to the financial institution providing the mortgage money. The false document was not, however, relied upon by the financial institution; according to the stipulated facts of the

case, the financial institution knew that the verification of the earnest money deposit was false and was itself responsible for the manufacture of the false document. The apparent purpose of the financial institution's dishonesty was to induce its private mortgage insurer to insure the mortgage. According to the stipulated facts, the fraud here was perpetrated by the financial institution for its own benefit. The financial institution is not, however, a party to this proceeding and has had no apparent part in the development of the stipulated facts upon which the proceeding is to be decided.

This case presents the circumstance of a financial institution inviting participation of a real estate licensee in an apparent fraud upon its private mortgage insurer. In many respects, the victim of this particular fraud is the respondent. There has been no foreclosure. The real estate transaction was successful. The buyer continues to live in the property, and is current on his payments, and has not been harmed by the work credit arrangement on the earnest money provision of the sale. The only person who appears to have suffered any ill effect of the false verification is respondent, who signed the false verification at the insistence of the financial institution which prepared it, knowing it to be false.

On the basis of the stipulated facts, it is clear that respondent Kaplan signed the false verification at the insistence of the financial institution providing the mortgage money in order to save the transaction. It does not appear that this constitutes legally cognizable duress, or that this situation would excuse the knowing misrepresentation of the facts involved in the financing of the transaction to other entities with an interest in the transaction. Mr. Kaplan undoubtedly felt pressured to assist in the consummation of the transaction, but, by doing what he did, he became an accessory to the financial institution's apparent fraud of the mortgage insurer.

There is no question that the real estate broker has a duty of honesty and fair dealing to all persons involved in a real estate transaction. Mr. Kaplan clearly failed in that duty in this case by depriving the mortgage insurer of a basis of its bargain. The assurance that the purchaser has put up a substantial amount of cash is a measure by which the private mortgage insurer determines its risk and its willingness to participate in the transaction. In this case, respondent's action provided a false assurance. There was, however, no damage done to the private mortgage insurer as the mortgage remains current.

The purposes of discipline are the protection of the public, the rehabilitation of the licensee, and the deterrence of the licensee and others from similar conduct. The choice of discipline in this case, upon the stipulation to facts constituting a violation of the Wisconsin Statutes and Administrative Code, is a difficult one. The respondent does not appear to present any significant on-going threat to the public, and the single violation which is charged as a result of the amendments to the complaint does not indicate a respondent whose practices must be significantly reformed or

rehabilitated. On the other hand, even the single violation charged by the amended complaint is of a serious nature, since it is destructive of the trust which licensees are supposed to guard for persons who are involved in or interested in real estate transactions.

A term of suspension of respondent's broker's license will serve the purpose of deterrence without subjecting the respondent to unreasonably harsh consequences for a single violation in an otherwise unsullied license record. The suspension period I recommend is shorter than suspension periods ordered in other cases where a licensee falsely verified earnest money deposits in trust because of the complicity of the financial institution in this case. I would not want to place the entire onus of this particular violation on the broker, while leaving the financial institution without sanction. The Board cannot reach the financial institution, but it can show some discretion in the discipline imposed on the licensee without depreciating the seriousness of the violation or necessarily implying that any licensee has less of a duty of honesty or fair dealing when participation in a fraud is proposed by someone else. A reprimand is clearly not sufficient to carry the necessary deterrent effect, but a long suspension carries practical consequences to the licensee's business which are, I think, unwarranted under the facts of this case and the single violation charged by the amended complaint.

Dated this 15th day of January, 1991.

James E. Polewski

James E. Polewski
Administrative Law Judge

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for each and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of wisconsin Real Estate Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Real Estate Board.

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Real Estate Board.

The date of mailing of this decision is February 25, 1991.

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227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.